Court Decisions and Updates

In The Matter Of Establishment Inspection Of: Wedgewood Pharmacy, Inc., (D.N.J.). On December 3, 2003, the United States District Court for the District of New Jersey denied an appeal by Wedgewood Pharmacy of a Magistrate Judge's denial of the pharmacy's Motion to Quash an administrative search warrant obtained by FDA under the Federal Food, Drug, and Cosmetic Act. FDA attempted to inspect the pharmacy because it had information that the pharmacy was manufacturing drugs, which would require it to comply with current good manufacturing practice. The pharmacy's owner had interrupted and objected to an FDA inspection of the pharmacy before the investigators could finish.

Wedgewood argued that, because it was a pharmacy, it was exempt from FDA inspection of its drug records, processes, controls, and its facilities under the statute. FDA maintained that it had statutory authority to inspect the pharmacy to determine whether it is subject to FDA inspection. The Court found that, because FDA had good cause to believe that the pharmacy was not an exempt pharmacy, it had statutory authority to conduct the inspection.

Abigail Alliance and Washington Legal Foundation v. Thompson, (D.D.C.). On August 30, 2004, U.S. District Judge Ricardo M. Urbina dismissed plaintiff's lawsuit. Plaintiffs Abigail Alliance for Better Access to Developmental Drugs ("Abigail Alliance") and the Washington Legal Foundation ("WLF") filed suit challenging the constitutionality of FDA regulations and policy that limit patient access to unapproved drugs, asserting that terminally ill patients who are willing to assume the risk of experimental treatment should have access to such treatments. They further alleged that FDA restrictions on such access violate patients' rights to privacy and liberty and deprive them of life without due process under the U.S. Constitution.

The government moved to dismiss plaintiffs' complaint. FDA argued that plaintiffs had failed to exhaust their administrative remedies; that the claim was not ripe; and that there was no final agency action. Additionally, FDA argued that plaintiffs had failed to identify a fundamental right that was being infringed and argued that FDA's regulations and policy were rationally related to a legitimate state interest.

The Court determined that, as a matter of law, plaintiffs failed to state a recognized due process claim. The Court determined that there is no fundamental right of access to unapproved, investigational drugs and rejected plaintiffs' attempt to create such a right.

Further the Court held that FDA's regulations and policy of forbidding commercial sale of unapproved investigational drugs to patients is rationally related to FDA's public health purpose.

Campaign for Responsible Transplantation v. FDA, (D.D.C.). On September 24, 2004, U.S. District Judge Ricardo M. Urbina granted summary judgment in favor of FDA. Plaintiff brought this case pursuant to the Freedom of Information Act ("FOIA"), seeking to compel FDA to release documents that it withheld under certain exemptions to the FOIA. Plaintiff first submitted its FOIA request in 2000, seeking all documents concerning clinical trials that involve xenotransplantation. During the course of litigation, FDA released numerous documents to plaintiff and produced a Vaughn Index detailing all of the withheld information. In its opinion, the court held that FDA had satisfied its burden of demonstrating that the withheld information was exempt from disclosure because it is either confidential commercial information, or predecisional and deliberative. The court also rejected plaintiff's claims that the descriptions in FDA's Vaughn Index were insufficient, finding that the agency provided a thorough explanation for withholding.

Mylan Pharmaceuticals Inc. v. FDA, (N.D. W. Va.). Mylan voluntarily dismissed this case, without prejudice, on August 30, 2004. Mylan argued that the FDCA prohibited brand-name drug companies from marketing authorized generic versions of their drugs during a first generic drug's 180-day exclusivity period. At an August 27 hearing, U.S. District Judge Irene Keeley indicated her agreement with FDA that the statute and case law did not support Mylan's contentions. Mylan stated in its notice of voluntary dismissal that "[t]he importance of these issues to Mylan and the entire generic pharmaceutical industry has led Mylan to conclude that all potential claims and aspects of the problems raised by authorized generics should be presented for review together in one action," suggesting that Mylan intends to litigate this issue again in the future.

Novartis Pharm. Corp. v. Thompson, (D.D.C.). Chief U.S. District Judge Thomas Hogan upheld FDA's determinations concerning the approval status of various dosage forms of Novartis's cyclosporine Neoral product. FDA had originally approved Novartis's designation of Neoral as "cyclosporine oral solution for microemulsion" and "cyclosporine capsules for microemulsion," but later withdrew the approval for the microemulsion dosage forms. As a result, Novartis faced competition from generic

versions of the drug that did not form a microemulsion. The Court also upheld FDA's designation, without notice and comment rulemaking, of an established name.

Aldridge v. Thompson, (N.D. Tex.). On September 8, 2004, U.S. District Judge Jerry Buchmeyer granted the government's Motion to Dismiss the complaint in this FOIA lawsuit. The plaintiff had filed the lawsuit seeking documents concerning Halcion, a drug that is at issue in other lawsuits he has filed against the government. After producing the documents, the agency moved to dismiss plaintiff's complaint because the agency had not improperly withheld records. The court granted the government 's Motion.

Lori Bower v. FDA, (D. Maine). Plaintiff Bower filed a lawsuit to compel FDA to respond to her FOIA request of September 2003, regarding the drug Luvox. FDA filed a Motion for a Stay, explaining that the workload of the Center for Drug Evaluation and Research's (CDER) Division of Information Disclosure Policy (DIDP) prevented a full and complete response before February 2008. Plaintiff filed an opposition brief. In a subsequent briefing, FDA revised its estimated completion date to March 2007, taking into account a reduction in the backlog of outstanding FOIA requests. On August 30, U.S. Magistrate Judge Margaret Kravchuk granted FDA's Motion to Stay requiring FDA to update the Court and Plaintiff of the status of the request and the estimated completion date by March 30, 2005. In reaching her decision, Judge Kravchuk noted the litigation demands of CDER DIDP and its policy of processing requests on a FIFO basis.

NVE, Inc. v. DHHS, (D.N.J.). On August 4, 2004, U.S. District Judge Joel Pisano issued an Opinion and Order on the proper standard of review to be applied in this challenge to the validity of FDA's Ephedra Final Rule, which declares dietary supplements containing ephedrine alkaloids to be adulterated. NVE, a manufacturer of such dietary supplements, claims that in promulgating the Ephedra Final Rule, which went into effect on April 12, 2004, FDA violated the Dietary Supplement Health and Education Act of 1994 (DSHEA), the Administrative Procedure Act (APA), and the U.S. Constitution.

NVE disagreed with the government over the standard of review the court should apply. "Record review," provided for by the APA, limits the court's review to the record in front of the Agency when it promulgated the rule. " De novo" review means that evidence not before the Agency may be presented to the court. DSHEA provides that, a court shall, on

a "de novo" basis, decide "any issue" arising under the definition of adulteration for dietary supplements.

In this case, the court ruled that NVE was not entitled to discovery and could not supplement the administrative record with affidavits from experts. In reaching this conclusion, the court reasoned that the APA (and not DSHEA) permits this lawsuit to be brought against the government. Accordingly, the scope of review in this action is governed by the APA and its rule limiting judicial review to the record compiled by the agency. Although the court recognized that there were three exceptions to the APA's record review limitation, NVE had not adequately argued that any of those exceptions applied.

The court also ruled that it would not give FDA deference, either on the legal question of what constituted "unreasonable risk" or on the underlying factual findings that led to the ultimate finding of adulteration. FDA had argued that Supreme Court precedent held that deference applied unless expressly stated otherwise by Congress; FDA also acknowledged that it was not entitled to deference on the ultimate finding of adulteration but that it was entitled to deference on the preliminary scientific issues. The court found that the "de novo" language in DSHEA controlled the usual rules of scientific deference.

The court further provided that, at the request of either party, within seven days of the date of its Opinion and Order, it would submit the question of the standard of review to the United States Court of Appeals for the Third Circuit. The government does not currently plan to request such action.

Center for Science in the Public Interest v. FDA, (D.D.C.). On August 6, 2004, U.S. District Court Judge Reggie B. Walton dismissed the Center for Science in the Public Interest's (CSPI's) complaint challenging FDA's interim guidance on qualified health claims. The interim guidance was, as the court acknowledged, spurred by the D.C. Circuit's decision in Pearson, where the court determined, on First Amendment grounds, that FDA can not deny a health claim that lacks significant scientific agreement (SSA) without first considering whether a disclaimer would cure the potential to mislead. The challenged guidance permits FDA, in the wake of the D.C. District Court's decision in Whitaker, to allow a qualified health claim as long as some credible evidence supports it, even where the weight of the evidence does not.

CSPI challenged FDA's interim guidance on two grounds: (a) it allowed manufacturers to make health claims on foods in without meeting the SSA standard of the Nutritional Labeling and Education Act of 1990 and (b) the guidance was issued without notice and comment. Judge Walton determined that CSPI could not establish that its claims were

ripe for adjudication because CSPI has not suffered an injury separate and apart from the alleged procedural injury (issuance of the interim guidance without first allowing for notice and comment) and because FDA has not yet applied the interim guidance. Furthermore, the court determined that CSPI lacked standing to challenge the interim guidance because, where the guidance has not been applied, CSPI can not establish a concrete injury in fact. CSPI has filed a Motion to Alter or Amend the court's decision.

Alphapharm Pty Limited v. Thompson, (D.D.C.). On August 12, 2004, U.S. District Judge James Robertson issued an Order granting the government's Motion for Summary Judgment. In this lawsuit, Alphapharm challenged FDA's decision regarding the submission and listing of patent information allegedly related to the NDA for citalopram hydrobromide (Celexa). Alphapharm also challenged FDA's decision not to accept its ANDA for generic citalopram in January 2003. Alphapharm argued that, based on its own evaluation of the patent at issue, as well as certain communications between the patent owner and the Patent and Trademark Office regarding an application for a patent term extension for the patent, FDA should have required the NDA holder to submit patent listing information for the patent and should have listed the patent in the Orange Book. FDA argued that the Federal Food, Drug, and Cosmetic Act (FDCA) delegates to the agency a ministerial duty to list patents and that FDA is not required to determine independently whether a patent meets the statutory criteria for listing.

The court held that, the FDCA unambiguously delegates to FDA only a ministerial duty to list patents. The court also held that, even if there were enough ambiguity in the statute, FDA's reading of its duties regarding patent listings is the most natural one. The court found that FDA's position is consistent with applicable case law and with the agency's longstanding claim that it has no expertise in the field of patents. After finding that FDA's decision not to list the patent at issue was reasonable, the court held that FDA properly refused to received Alphapharm's ANDA for review in January 2003 because that decision hinged on FDA's refusal to list the patent.

Public Citizen v. Food and Drug Administration, (D.D.C.). On June 18, 2004, Public Citizen voluntarily dismissed its case against FDA, in which it sought an order compelling the Agency to respond to a citizen petition. In that citizen petition, Public Citizen asked that FDA withdraw its approval of the prescription drug Serzone. On June 14, FDA issued a detailed response to that citizen petition and denied Public Citizen's request that it withdraw Serzone's approval. Concurrently, the government filed a Motion to Dismiss Public Citizen's lawsuit. FDA argued that the court had no jurisdiction to hear

the case because the controversy alleged in Public Citizen's complaint is moot. Although Public Citizen's voluntary dismissal terminates its present case, it does not prevent a future legal challenge to the denial of the citizen petition.

Apotex Inc. v. FDA, (D.D.C.). On June 3, 2004, U.S. District Judge Ellen Segal Huvelle denied plaintiff's Motion for a Preliminary Injunction and stay, granted the government's Motion to Dismiss, and entered final judgment in favor of FDA. Apotex (formerly known as TorPharm) and Purepac Pharmaceutical Co., had submitted to FDA Abbreviated New Drug Applications (ANDAs) for generic versions of gabapentin capsules. FDA had determined that Purepac was entitled to 180-day marketing exclusivity granted to the first ANDA applicant to file a "paragraph IV certification" with respect to a particular patent. In an earlier case, Apotex challenged that determination and lost. That decision was upheld by the D.C. Circuit.

In this case, Apotex challenged on a new legal ground FDA's determination that Purepac was entitled to 180-day excluisvity for gabapentin capsules. Apotex had argued in a separate case involving another drug, paroxetine, that FDA incorrectly interprets the exclusivity provision of the FDCA: that instead of considering the first paragraph IV certifications submitted on all of the patents listed for a particular drug (the "patent-based" approach), FDA should consider only the first paragraph IV certification submitted on the product (the "one-first-applicant" approach). The district court in the paroxetine case ruled in favor of Apotex (the "one-first-applicant" approach) and that decision is on appeal.

In the earlier gabapentin case, Apotex did not challenge FDA's patent-based approach. Apotex now argued that, given the outcome in the paroxetine case, FDA could not apply the patent-based approach to gabapentin. Alternatively, Apotex argued that the court should apply the one-first-applicant approach as the correct way to apply the statute.

FDA moved to dismiss, arguing that Apotex was precluded from bringing a new legal challenge to the same matter it previously challenged on other grounds. FDA also opposed Apotex's Motion for Injunction on the ground that FDA's patent-based approach was the correct, or at least a permissible, interpretation of the statute.

In a ruling immediately following oral argument, Judge Huvelle agreed with FDA on both grounds. In particular, she found that Apotex could not use the paroxetine opinion to attack the earlier gabapentin decision as the legal theory was available to it in the earlier phases of this case. On the merits, Judge Huvelle explained that the question was whether the statute was ambiguous and whether FDA's interpretation was permissible. She held that the language of the statute was internally inconsistent and explained that one purpose

of the patent-based approach was to improve the chances of an earlier launch of a generic product, and it was reasonable for FDA to adopt the approach it did. Apotex has filed a notice of appeal.

Jerome Stevens Pharmaceuticals, Inc. v. FDA, (D.D.C.). On May 28, 2004, U.S. District Judge Ricardo Urbina granted FDA's Motion to Dismiss. Plaintiff Jerome Stevens Pharmaceuticals, Inc. ("Jerome") is a small pharmaceutical manufacturer that produces Unithroid, drug used in the treatment of thyroid disease. Jerome sued the United States government for $1.345 billion in damages and declaratory relief alleging that FDA released some of Jerome's trade secret and confidential commercial information and that FDA was arbitrary and capricious in matters concerning deadlines for competitors to obtain approvals. Allegedly as a result of these actions, Jerome's Unithroid product had not captured as great a percentage of the market as it had expected. Jerome based its claims on the Federal Tort Claims Act ("FTCA"), the Administrative Procedure Act ("APA"), and the Fifth Amendment to the United States Constitution.

The court held that the FTCA claims were barred by the discretionary function exception. The court found Jerome's arguments inconsistent in that it alleged that its damages were caused by FDA's disclosure of the allegedly trade secret information, but Jerome's damage calculation was based on a prediction of its market share had FDA not extended the deadlines and instead kept Jerome's competitors off the market. Thus, the court treated the tort claims as based on the deadline extensions instead of on the document disclosure, and the deadline extensions undoubtedly fell within the discretionary function exception to the FTCA.

The court further held that it lacked jurisdiction over the APA and constitutional claims relating to disclosure of the Jerome documents. FDA had already removed from its website the portions of the documents about which Jerome had complained. The court held that there was no continuing adverse impact or controversy that warranted declaratory relief. Finally, the court found that it lacked jurisdiction over the APA claim related to deadline extension because such decisions were committed to the agency's discretion and not reviewable by a court.

Ranbaxy Laboratories, Ltd. v. FDA, (D.C. Cir.) On April 26, 2004, Judges Edwards, Randolph, and Rogers affirmed the district court's judgment granting summary judgment for the government. This case involved the interpretation of the provisions of Federal

Food, Drug and Cosmetic Act governing abbreviated new drug application (ANDA) approvals and pediatric exclusivity. Plaintiff/appellant, Ranbaxy Laboratories, a generic drug manufacturer asked the court to order FDA to immediately approve its ANDAs for fluconazole. Ranbaxy contended that it was entitled to approval on January 29, 2004, the expiration date for the last applicable patent belonging to the NDA holder, Pfizer. FDA had determined, however, that Pfizer was entitled to pediatric exclusivity.

The pediatric exclusivity provision applies differently depending on whether the ANDA applicant submitted a paragraph II, III, or IV certification. Ranbaxy had filed a paragraph IV certification, but the patent expired without a substantive resolution of the ensuing patent litigation. FDA and Ranbaxy agreed that *after* a patent expires, the only valid certification is a paragraph II certification, which states that the patent has expired. However, Ranbaxy contended that pediatric exclusivity should be granted as if it had paragraph IV certification because it held that certification when the patent expired and was entitled to immediately effective approval. In FDA's view, there was no immediately effective approval, and approval becomes effective only when FDA issues its approval letter after a final substantive review. At the moment the patent expired, the paragraph IV certification was invalid, and the ANDA could not be approved unless Ranbaxy submitted a paragraph II certification or FDA deemed the invalid paragraph IV certification to be a paragraph II certification. Therefore pediatric exclusivity attached as if Ranbaxy had a paragraph II certification.

The D.C. Circuit, in a one-page, per curium judgment, held that the district court properly affirmed FDA's determinations that: final approval of Ranbaxy's ANDAs did not automatically occur upon expiration of the patent and the termination of the 30-month stay; upon expiration of the patent, Ranbaxy's paragraph IV certifications became invalid; and, under the pediatric exclusivity provision relating to paragraph II certifications, approval of Ranbaxy's ANDAs would be delayed for six months.

Dowhal v. SmithKline Beecham, (Cal.). On April 15, the Supreme Court of California held that, when a product warning mandated by California law directly conflicts with a warning required by FDA, the federal requirement prevails. FDA filed an *amicus* brief in this case (and participated at oral argument) asserting that the Federal Food, Drug, and Cosmetic Act (FDCA) preempts a California state law as applied to a warning for over-the-counter nicotine replacement therapy products.

Plaintiff alleged violations of Proposition 65, a state law, causing pregnant women and their unborn fetuses to be exposed to nicotine through the use of defendants' nicotine replacement therapy products without providing the state - required warnings. Defendants argued that the FDCA controls the contents of warnings on such products.

FDA argued that federal law prevails because 1) it would be impossible for defendants to comply with both federal and state law; and 2) the application of the state law frustrated the purposes and objectives of Congress as expressed in the FDCA. FDA had determined that the particular warning sought by the plaintiff was not scientifically supportable and including it would misbrand the product. FDA also argued that the FDCA requires warnings that are not false or misleading and, in this case, the warning could discourage consumers from using the products, and increase the risk that pregnant women would be exposed to tobacco smoke.

The California Supreme Court concluded: 1) notwithstanding language in the FDCA exempting Proposition 65 from preemption, when a warning mandated by California law directly conflicts with an FDA requirement, the latter prevails; 2) this case involved a direct conflict; and 3) FDA has the authority to prohibit use of the Proposition 65 warning if FDA concludes it would have the effect of misleading consumers.

Motus v. Pfizer Inc., (9th Cir). On February 9, 2004, the Court of Appeals agreed that the plaintiff in this third party case failed to establish a causal link between her husband's suicide and the drug Zoloft. FDA participated as an *amicus curiae.* Plaintiff originally sued Pfizer, Zoloft's manufacturer, alleging that: 1) Pfizer failed to adequately warn of the dangers, contraindications, and side effects of the drug; and 2) the drug was not properly labeled because it did not warn that "the drug can cause the user to become violent and suicidal." Initially the state court found that there was no causal link between the suicide and Pfizer's responsibility. Plaintiff appealed and Pfizer cross-appealed raising issues of federal preemption over drug labeling. FDA filed an *amicus* brief and agreed that, because the agency regulates the labeling of prescription drug products, its decisions preempt the causation warning sought by plaintiff. FDA has repeatedly evaluated all relevant, known, scientific evidence concerning this drug and has concluded that a suicide causation warning is not scientifically supportable. However, because the Ninth Circuit did not find a causal link between the death and Pfizer's responsibility, it did not reach the preemption issues.

St. Louis University v. United States, (4th Cir.). On December 1, 2003, the United States Supreme Court denied St. Louis University's (SLU's) *certiorari* petition in this case brought by SLU against the United States for contribution to its tort liability judgment, after a St. Louis jury awarded $16 million to a child, Danny Callahan, who had become paralyzed shortly after receiving the oral polio vaccine but almost immediately after receiving improper treatment at a hospital associated with SLU. On July 16, 2003, the

Fourth Circuit reversed the District Court of Maryland's grant of partial summary judgment against the United States and remanded the case to the District Court for entry of judgment for the United States. The Fourth Circuit concluded that SLU did not prove that the government's regulatory violation in releasing the polio vaccine proximately caused Callahan's injury, because there was no evidence in the record that Callahan likely would not have contracted polio or would have contracted a less severe case of polio from a vaccine that met the regulatory standard.

United States v. Marvin Heldeman, (D.R.I.). On March 12, 2004, Marvin Heldeman, M.D., pled guilty before Chief United States District Judge Ernest C. Torres, to numerous charges related to his unlawful prescribing of anabolic steroids and prescription pain relievers. Heldeman wrote medically unnecessary prescriptions for anabolic steroids and other prescription drugs, including Oxycontin, Percocet, and human growth hormone, for at least six individuals. In exchange for the prescriptions, the individuals posed for Heldeman in various stages of undress and/or engaged in sexual acts with Heldeman. Heldeman pled guilty to one count of conspiracy to commit health care fraud, seventeen counts of health care fraud, three counts of conspiracy to distribute controlled substances, and three counts of aiding and abetting the distribution of controlled substances.

Debarment List

The following is a public list of firms or persons debarred during Fiscal Year 2004 pursuant to Sections 306(a) and (b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 335(a) and (b)). (21 U.S.C. 335(a) and (b)) as published in the Federal Register (FR).

Name of Person	Effective Date	End/Term of Debarment	FR Date.txt (MM/DD/YY	Volume/Page
Courtney, Robert Ray	10/20/2003	Permanent^	10/20/2003	68FR59942

SYMBOLIC NOTATIONS:
^ Mandatory Debarment (Sec. 306(a))

% Permissive Debarment (Sec. 306(b))

* Hearing requested and denied.

Acquiesced to Debarment.

+ Special Termination of Debarment (Sec. 306(d)(4)(C) and (D))

++ Order to Withdraw Order of Debarment (debarment terminated) (Section 306(d)(3)(B)(i)

!!! Rescission of Debarment Order

aka Also known as

NMI No middle Initial known to be used.

A complete debarment list is available on the Internet at:
>http://www.fda.gov/ora/compliance_ref/debar/debar.txt>

DISQUALIFIED/TOTALLY RESTRICTED LIST FOR CLINICAL INVESTIGATORS

FDA regulates scientific studies that are designed to develop evidence to support the safety and effectiveness of investigational drugs (human and animal), biological products, and medical devices. Physicians and other qualified experts ("clinical investigators") who conduct these studies are required to comply with applicable statutes and regulations intended to ensure the integrity of clinical data on which product approvals are based and to help protect the rights, safety, and welfare of human subjects.

The following list contains the name(s) of all clinical investigators who have been disqualified or "totally restricted" in Fiscal Year 2004. FDA may disqualify a clinical investigator if the clinical investigator has repeatedly or deliberately failed to comply with applicable regulatory requirements or the clinical investigator has repeatedly or deliberately submitted false information to the sponsor or, if applicable, to FDA. A disqualified clinical investigator is not eligible to receive investigational drugs, biologics, or devices. In the past, the phrase "totally restricted" was also used to refer to clinical investigators who had been disqualified. Where an investigator has been reinstated, it is so noted.

It is important to underscore the difference between "totally restricted" clinical investigators and "restricted" clinical investigators. "Totally restricted" investigators are ineligible to receive investigational products (absent reinstatement). "Restricted" investigators, on the other hand, are still eligible to receive investigational products, provided they conduct regulated studies in accordance with the restrictions specified in their agreement with FDA and all applicable regulatory requirements.

FDA maintains separate lists for all clinical investigators who have agreed to certain restrictions with respect to their conduct of FDA regulated studies; and clinical investigators who have provided adequate assurances with respect to their future (http://www.fda.gov/ora/compliance_ref/bimo/dis_res_assur.htm). These lists are updated regularly. For further information about these lists, contact: James McCormack, Ph.D., Food and Drug Administration, Office of Enforcement, 5600 Fishers Lane, HFC-230, Rockville, MD 20857.

D Disqualified or totally restricted clinical investigators who are not eligible to receive investigational products.

DR Reinstated

R Restricted

Name Address	Center	Type	Action Date	Comments
Carl Andrew DeAbate, M.D. Washington, DC	CDER	D	05-FEB-2004	By Consent Agreement